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In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CLINTWOOD ELKHORN MINING COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMICUS CURIAE BRIEF OF ALLIANCE COAL, LLC IN SUPPORT OF RESPONDENTS

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AMICUS STATEMENT OF INTEREST

Amicus Alliance Coal, LLC operates subsidiaries who are plaintiffs in cases pending in the Court of Federal Claims that raise the same issues and whose outcome will likely be determined by this appeal. *Amicus* thus has a vested interest in the appeal and wishes to address certain legal issues, in particular why the tax refund statute procedures do not govern an independent right of action under the Export Clause and why the Government's assertion to the contrary is barred by this Court's line of cases rejecting any repeal of Tucker Act jurisdiction by statutory implication.[1]

SUMMARY OF ARGUMENT

Amicus files this brief to support the decision of the Federal Circuit Court. Respondents contend that they have two independent causes of action to recover the illegally collected taxes – one is through the tax refund statute provisions permitting recovery through the claims process administered by the IRS, and the second, alternative route is through the Export Clause pursuant to the Tucker Act's jurisdictional grant and procedural rules.[2] The

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1. Pursuant to Rule 37.6, *Amicus Curiae* certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2 The Tucker Act itself does not provide any right to recovery, only the jurisdiction required to pursue a right identified elsewhere. *E.g.*, *United States v. Testan*, 463 U.S. 392 (1976); *United States v. Mitchell*, 463 U.S. 206 (1983).

Government contends that only the tax refund statute cause of action is available, and that even if the Export Clause provides an independent route of recovery, the procedures governing that route must be imposed by the tax refund statute. Those procedures would include not only the three-year statute of limitations, but also the requirement that the Respondents must have filed a claim for refund and pursued the administrative remedy before filing suit.[3] The Government relies heavily on the "no suit" and "any court" language in section 7422(a),[4] and on the canon of construction that the more specific provisions in the tax refund statute override the procedural requirements Congress had already provided in the Tucker Act. In essence, the Government contends that section 7422(a) has created a "black hole" that has swallowed the field of recovery of improperly collected taxes, in the process removing any such jurisdiction that otherwise would have vested not only in the Tucker Act's own broad language and procedural requirements but through any other right of recovery, "be it regulatory, statutory, or constitutional." Pet. Br. at 8.

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[3] Some coal producers, like Alliance Coal, pursued both routes out of an abundance of caution, and have obtained a refund under the tax refund statute for the years available but have not obtained any relief under the Tucker Act approach for the prior three years. Other producers pursued only the Tucker Act litigation and did not file any claim for refund, and thus presumably their entire recovery is dependant on the ruling in this appeal.

[4] 26 U.S.C. 7422(a) states: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... until a claim for refund or credit has been duly filed with the Secretary...."

Two panels of the Federal Circuit have disagreed with the Government,[5] and *Amicus* believes that court's opinions were correct. Given that the Export Clause provides a separate cause of action for recovery of illegally collected export taxes,[6] this case must be viewed through the lens of one of the most widely accepted doctrines in United States law, that plaintiff is permitted to choose its route to recovery and may plead independent theories, even if they overlap and would result in the same recovery. Ordinarily, the procedural rules that govern a cause of action are drawn from the substantive right to recover. A classic example is the statute of limitations – the limitations period for a contract action, for example, is drawn from the statutes or common law governing contract cases, and would never be imposed (or vice versa) on a negligence action, even if the relief sought (e.g., recovery of money) is exactly the same in both actions. Taxpayers who pursue a refund under the right granted by Congress in the tax refund statute without question would have to follow the procedures Congress imposed on that right of recovery – including the filing of a refund claim and a three-year limitations period. Given two

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[5] *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000); *Clintwood Elkhorn Mining Co. v. United States*, 473 F.3d 1373, 1374-75 (Fed. Cir. 2007).

[6] Respondents will brief the issue of whether the Export Clause provides an independent and self-executing right of action. Thus, *Amicus* will not address that issue here but will focus on the Government's primary position that the tax refund statute usurps the Tucker Act procedures and limitations period.

alternative routes of recovery, however, Respondents were not bound to the tax refund statute cause of action but were free to choose the Export Clause route. The procedures governing that cause of action – including the Tucker Act six-year limitations period – are those springing from the source of the right, i.e., the Export Clause.

If this is so, and *Amicus* asserts that this is the proper view of the case, then the Government is hard put to identify any reason why the procedures set forth in the tax refund statute should have anything to do with an action under the Export Clause. The Government relies heavily on the language of section 7422(a), but nothing in that provision suggests it is intended to cover causes of action that are not "actions to recover taxes" under the tax refund statute itself. The provision is limited by its terms to suits involving tax refund claims under the statute – and does not encompass contract actions, lawsuits based on other statutes, or constitutional claims for damages, as Respondents assert here. The language of section 7422(a) indicates only Congress' intent to apply the section 7422(a) ban to all lawsuits founded on *the tax refund statute itself* that do not proceed first through the claim for refund process.

Numerous opinions dating back one hundred years confirm that section 7422(a) and its predecessor section 3226 are limited by their terms to revenue act causes of actions. Since the early 1900s, taxpayers have asserted a substantive right to recover taxes other than the statutory right under the tax refund provision, based typically on a contract right, a separate statute, or the

Constitution.[7] In those instances, discussed in Section II, the taxpayer has *not been bound* by the requirement to file a claim, or by the Code's more narrow limitations period, and instead has utilized the Tucker Act's six-year limitations period over Government objections. In addition, these cases proceeded in the face of language identical to section 7422(a) dating back to 1875,[8] yet that language has not been held to foreclose tax-related lawsuits based on other causes of action. The Government accuses the Federal Circuit Court of "fashion[ing] an 'alternative' judicial remedy" calling on the longer Tucker Act limitations period (Pet. Br. at 7, 14), but in fact such alternative routes have existed for a long time. Thus, the Government's broad view of section 7422(a) is erroneous historically – taxpayers have long pursued other routes, some of which have been blessed by this Court.

Given this historical reality, the Government's position can only mean that the tax refund statute at

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[7] 28 U.S.C. 1491(a)(1) states in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States ...."

[8] Section 3226 of the 1875 act states: "No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of [*the*] Internal Revenue...." 1 Rev. Statute 622 (1875).

some point in time repealed the long-standing residual jurisdiction of the Tucker Act over contract, statute, and constitutional routes to a tax remedy.[9] This proposition cannot be true, either. A claimed repeal of Tucker Act jurisdiction by a statute that does not even mention the Tucker Act would fly in the face of a very strong and consistent line of Supreme Court authority (the *Regional Rail Cases)* under which a repeal of an existing statute cannot be implied from a subsequent statute unless Congress has expressed an "unambiguous intention" to effect a repeal. *See Preseault v. I.C.C.*, 494 U.S. 1, 12 (1990); *see also Regional Rail Reorganization Cases*, 419 U.S. 102 (1974). In five consecutive decisions, this Court has refused to eliminate or even cut back on existing Tucker Act jurisdiction in the face of argument that a separate Congressional statute repealed a portion of that grant.[10] These decisions reject the arguments presented by the Government here to support an implied repeal, namely reliance on plenary statutory terms such as "all" or "any, the complexity of the statutory scheme, or the need to protect the public fisc. Absent express intent from Congress to repeal the Tucker Act's residual tax

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[9] The implied repeal inferred by the Government is not minor or merely an administrative convenience – for some coal producers, including *Amicus*, it would cut their recovery period in half, and for others it would eliminate their claims entirely. The repeal suggested here cannot pass muster under the criteria used in the *Regional Rail* line of cases.

[10] *Preseault*, 494 U.S. 1; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Regional Rail*, 419 U.S. 102; *Amell v. United States*, 384 U.S. 158 (1966).

jurisdiction, the Government cannot be correct that section 7422(a) or any earlier provision of the revenue statute must be held to displace Tucker Act jurisdiction and procedures, including the six-year limitations period.

The Court does not need to abrogate the Tucker Act's tax jurisdiction, as the Government argues, in order to reconcile these two apparently colliding statutes. The tax refund statute procedures the Government asserts here would certainly govern any action brought under that act (i.e., all "actions for recovery of taxes"). In such a case, the Tucker Act substantive right is premised on the right to recover under that statute, which is the source of the waiver of sovereign immunity. This route encompasses the vast majority of tax refund actions. When the right to recover illegally collected taxes arises from a source *other than* the tax refund statute, however, the Tucker Act grants a cause of action and waives sovereign immunity for a direct claim against the Government, without recourse to the tax refund statute or its procedures. The number of claims that can be brought outside the tax refund statute is quite limited, but the Export Clause retains vitality as one of those sources, as this Court held in *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998). That is the path the Respondents and *Amicus* have taken.

Ultimately, the tax refund statute procedures urged by the Government here are not "more specific" provisions – they are *irrelevant* provisions. The coal producers are not bound by the tax refund statute claim for refund process or statute of

limitations because those provisions do not apply to a constitutional right to recover taxes through the Export Clause.

ARGUMENT

I. The Procedural Requirements Applicable to This Case Are Those Arising from the Source of Respondents' Right to Recover, the Export Clause.

The Government is wrong that this is a case about competing procedural provisions governing the same right, one of which is more specific than the other. The case is about two separate and independent grounds for recovery, each of which is governed by its own set of procedural requirements. The Government's most fundamental error is in its attempt to graft procedural requirements from one right of recovery, the tax refund statute, onto the Export Clause "count" or "cause of action" which Respondents have available to them. A plaintiff is entitled to select the cause of action and jurisdiction most favorable to its recovery and, if appropriate, even plead alternative causes of actions in the same case. *See* Fed. R. Civ. P. 8(a). As a corollary, the procedural restraints on a cause of action are those that are associated with the substantive right underlying that cause. This is the widely-acknowledged principle under which statutes of limitations operate – a statutory product liability cause of action limitations of two years, for instance, would never be imposed on a negligence cause of action whose statute is four years, merely on the ground that the product liability statute was more specific.

Christie-Street Comm'n Co. v. United States, 126 F. 991 (W.D. Mo. 1903), *aff'd*, 136 F. 326 (8th Cir. 1905), is an early application of this rule in the tax area that demonstrates why the Government's theory of the case is in error. The taxpayer pursued recovery of a tax refund under the claim procedure, but was untimely and tried to resort to the Tucker Act six-year limitation period. The taxpayer's only right to recovery, however, was the tax refund statute whose two-year statute of limitations was in the succeeding section of the code (section 3227). The court held that plaintiff could not utilize the Tucker Act limitations period *because* he had no other right of recovery: "[T]o maintain the action, the plaintiff must invoke some special enabling statute authorizing such suit. ... [Having chosen section 3226], the plaintiff must take the right thereby given, burdened with the conditions and limitations imposed." *Id.* The "general" versus "specific" argument applied in this analysis, but only because the more specific provision was *connected* to the right of recovery:

> It is, however, a well-settled rule of construction of such statutes, that such general provision does not conflict with a special limitation declared in *another statute, creating a particular cause of action* and prescribing the time within which it shall be brought.

Id. at 997 (emphasis added). The Government here is trying to accomplish the opposite – i.e., the Government is "borrowing" a specific statute from an unrelated cause of action to displace the applicable statute of limitations in another cause of action (the

Export Clause route). If this plaintiff could have asserted another cause of action – as Respondents do here under the Export Clause – his case would have proceeded under the six-year statute despite the presence of the more restrictive tax refund statute provision. The cases cited in Section II below also support this principle by refusing to apply tax revenue act procedures to rights of action from other sources. In addition, the primary cases relied on by the Government – *E.C. Term of Years Trust*, __ U.S. __, 127 S. Ct. 1763 (2007); *Hinck v. United States*, ___ U.S.___, 127 S. Ct. 2011 (2007); *United States v. A.S. Kreider & Co.*, 313 U.S. 443 (1941) – are only illustrations of other cases in which the cause of action asserted governed which procedures and limitations periods applied, as discussed in Section III. They do not support the Government's attempt to reverse the situation here.

The language of section 7422(a), despite its breadth, does not compel the Court to apply the tax refund statute's requirements to bar every other statutory, contract, and constitutional right to recover.[11] A number of courts, including this one, have recognized that when an action is brought under a substantive right to recover other than the tax refund statute, the action no longer falls under the language of section 7422(a) (or its predecessor section 3226) even if the taxpayer could have brought the action alternatively under the tax

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[11] *See* Pet. Br. at 8 ("Claims for repayment of unlawful tax are subject to the exclusive procedural requirements set out in the tax refund statute, no matter what the source of the alleged illegality – be it regulatory, statutory, or constitutional.").

statutes.[12] As a textual matter, it is both proper, and consistent with prior holdings of this and other courts, to construe the language of section 7422(a) to apply to actions brought under the tax refund statute, which are entirely and broadly foreclosed if the taxpayer does not file a claim for refund within three years.[13] Where a right exists outside of the tax refund statute, however, the procedures are governed by the source of the right, and nothing in the language of section 7422(a) declares Congress' unambiguous intent to make it otherwise. The Tucker Act and its procedural requirements, no less

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[12] *See, e.g., Daube v. United States*, 289 U.S. 367, 370 (1933) (tax recovery claim based "upon an account stated ... which gives rise to a new cause of action" was not constrained by the broad language of section 3226); *Bonwit Teller & Co. v. United States*, 283 U.S. 258, 265 (1931) (section 3226 did not apply to suit that was not pled under revenue statute but under contract theory to recover overpayment of taxes via certificate of overpayment in which IRS agreed to pay); *United States v. Hvoslef*, 237 U.S. 1, 10-11 (1915) (separate statutory cause of action did not require examination of "questions arising under the general provisions of the internal revenue act"); *Ray v. United States*, 453 F.2d 754, 758 (Ct. Cl. 1972) (case brought to recover taxes withheld on salary was "not a claim for refund of taxes" because it was brought under a different statute allowing recovery of "'pecuniary benefits' wrongly denied"); *Wm. J. Friday & Co. v. United States*, 61 F.2d 370, 370-72 (3d Cir. 1932) (refund process not applied to case for repayment of taxes brought under implied contract).

[13] Congress knew how to address Tucker Act issues in the tax statute when it chose to do so, as indicated by 26 U.S.C. 7422(f)(1), which specifically refers to 28 U.S.C. 2502 ("notwithstanding the provisions of section 2502 of title 28") in permitting actions against the United States. The Court should not imply that Congress intended part of the same code section (7422(a)) to abrogate all section 2501 tax jurisdiction when there is no mention of section 2501 anywhere in this provision.

enacted by Congress than the tax refund statute, are linked to Respondents right to recover (the Export Clause) and have been sufficiently "specific" to govern the prosecution of thousands of cases for more than a hundred years, including cases seeking "damages" or other relief for illegally collected taxes.

II. The Tucker Act Has Long Provided a Residual Tax Jurisdiction, Separate from the Tax Refund Statute, Based on Alternative Substantive Rights to Recover.

The Government's position in this case requires it to contend that the tax refund statute, presumably extending all the way back to the earliest ancestor of section 7422(a),[14] has forbidden taxpayers to recover taxes by any route other than the tax refund statute's procedural and administrative requirements. This position is not historically correct. There has always been a small but consistent stream of tax recovery cases presented directly in court through other laws; under theories of contract, implied contract, or "account stated;" or pursuant to constitutional causes of action. None of these actions depended on the tax refund statute for their viability or procedures. Given this line of cases, the Government is incorrect that the tax refund statute has occupied the entire field of tax recovery – it only occupies "recovery of taxes" causes of action based on the tax refund statute or otherwise where Congress has specifically declared that the Internal Revenue Code replaces Tucker Act jurisprudence.

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[14] The broad language of section 7422(a) existed as long ago as 1875. *See supra* n. 8.

A. Independent Tucker Act Tax Jurisdiction Developed in the Early 1900s and Became a Rule of Law by 1915.

Prior to 1915, tax law developed the procedures and jurisdictional rules under which taxpayers could pursue multiple routes to recovery based on separate causes of action. Before the Tucker Act was passed in 1887, the only route to recover a refund initially was a common law or statutory suit against the tax collector in an action of *assumpsit*.[15] Suits against the United States itself were not permitted because sovereign immunity had not yet been waived. A revenue law required that the payment of an illegal customs duty not be refunded unless paid under protest.[16] That statute played a role in the 1868 holding of this Court in *Nichols & Co. v. United States*, 74 U.S. 122 (1868), that an importer could not sue in federal court, even under alternate theories, without complying with the statute's protest requirement. *Id.* at 126, 130-31.

Nichols, however, preceded the Tucker Act. Over the first quarter-century of the Tucker Act's life, the broad *Nichols* rule became so distinguished and diminished that it clearly was no longer the law.

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[15] *See United States v. Kales*, 314 U.S. 186, 198 (1941); *United States v. Emery*, 237 U.S. 28 (1915); *Flora v. United States*, 357 U.S. 63, 66 (1958).

[16] Federal statutes included a "protest" requirement as early as 1845. *See* Act of Feb. 26, 1845, ch. 22, 5 Stat. 727. The earliest version of section 7422(a) may have been passed in 1866. Act of July 13, 1866, ch. 184 § 19, 14 Stat. 98, 152 ("no suit shall be maintained in any court for the recovery of any tax" without appeal to the commissioner).

As the Court of Federal Claims historians described it:

> After the Tucker Act, which did not change the language of the prior law relevant to this matter, there appeared exceptions to the sweeping ban of the *Nichols* case, though the view expressed there continued to be recognized as the general rule.... [discussing various exceptions]. It is not necessary in such a study as this to enumerate *all the instances where the Nichols dictum was avoided or ignored*.... Finally, in *Emery*, 237 U.S. 28 (1915), ... the *former exception became the rule.*

Cowen, W., et al., *The United States Court of Claims: A History*, pt. II, 39 (1978) at 43-44, reprinted in 216 Ct. Cl. (emphasis added).

During the pre-1915 era a number of taxpayers were permitted to proceed in district courts or Court of Claims without pursuing the administrative route first, and in some instances those actions were approved by this Court. For instance, in *United States v. Hvoslef*, 237 U.S. 1, 8-10 (1915), this Court accepted Tucker Act jurisdiction founded on a separate statute authorizing recovery of war taxes, in the process rejecting the Government's position that the only remedy was the approved revenue law route against the Collector. Likewise, in *South Carolina v. United States*, 199 U.S. 437, 438-40 (1905), the state was permitted to bring three causes of action on constitutional grounds over federal liquor taxes in the Court of

Claims without having pursued any protest or refund. The state lost on the merits but this Court did not question the right to proceed in federal court without pursuing revenue act remedy first. In *Dooley v. United States*, 182 U.S. 222 (1901), the Government claimed that the customs act (similar in scope to section 7422(a)) foreclosed all recovery outside the procedures therein. This Court in *Dooley* did not agree, in the process rejecting the very argument, in almost the very words, the Government is asserting here:

> [The *Nichols* case stated] that the [statute's] remedy [against the collector] was exclusive, and that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, did not intend to give the taxpayer and importer a *different and further remedy*. Subsequent statutes, however, have so far modified that special remedy ... and the broad statement in the *Nichols Case*, that revenue cases are not within the cognizance of the court of claims, if still true, must be accepted with material qualifications.
>
> We think the case is one *within the first class of cases specified in the Tucker act*, of claims *founded upon a law of Congress*, namely a revenue law, in respect to which class of cases the jurisdiction of the court of claims, under the Tucker act, has been repeatedly sustained.

Id. at 225, 228 (emphasis added). A decade later, citing *Dooley*, the Seventh Circuit upheld jurisdiction over a challenge to a tax assessment brought directly in a district court in the face of a Government claim that the revenue law provisions provided the exclusive remedy:

> [T]he jurisdictional test must be whether the several provisions for recovery of internal taxes prescribe a remedy which is inconsistent with the general provision of the Tucker Act, and may thus operate to exclude other remedies (citations omitted). We believe no such inconsistent provision appears in the sections referred to, and that the rule upheld in *Dooley* ... and authorities cited in the opinion furnishes ample support for jurisdiction over the claim in suit.

United States v. Finch, 201 F. 95, 97 (7th Cir. 1912).[17]

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[17] These are by no means the only such cases. *See, e.g., Emery*, 237 U.S. at 31-32 (rejecting Government contention that only route for recovery was suit against collector based on "all laws" language in statute) and cases cited therein (recognizing dual causes of action and right to recovery outside of revenue statute); cases cited in *Dooley*, 182 U.S. 222 at 230; *United States v. New York & Cuba Mail*, 200 U.S. 488 (1906) (accepting jurisdiction but rejecting claim for lack of duress); *cf. Christie-Street Comm'n Co.*, 126 F. 991 (W.E. Mo. 1903), *aff'd*, 136 F. 326 (1905) (assuming jurisdiction would have been proper if taxpayer could have asserted recovery under a right other than revenue statute).

Thus, as early as 1915, this Court accepted the proposition that the Tucker Act granted the Court of Claims jurisdiction even in cases that appeared to be barred by the procedural requirement to file a claim, which was equally broad in scope as current section 7422(a).

B. Subsequent Case Law Has Continued to Recognize Tax-Related Causes of Action Other Than the Tax Refund Approach.

Subsequent to 1915, courts have continued to recognize a class of cases that can proceed directly to court under Tucker Act procedures and jurisdiction if the cause of action arises outside the tax statute. The grounds for those actions are those set forth in the Tucker Act, including the Constitution, laws of Congress, and express or implied contracts with the IRS that form a separate right to recover.

One set of such cases involved those in which the right of recovery is based on contract, express or implied – an alternative cause of action to the tax refund statute. An early example is *Wm. J. Friday & Co. v. United States*, 61 F.2d 370 (1932), in which appellant taxpayer sought recovery of overpaid income taxes but missed the two-year statute of limitations under the predecessor to 26 U.S.C. 6511(a). *Id. at* 370. Appellant brought suit in the district court under the Tucker Act without pursuing the revenue act's administrative procedures, and the Third Circuit Court upheld jurisdiction. The court held that the district court erred in failing to recognize that "plaintiff pleaded its claim in two forms" – one the tax refund claim, and the other

based on "the government's promise [and subsequent failure] to pay which is implied in a certificate of overpayment made and delivered by the Commissioner of Internal Revenue." *Id.* at 371 (quoting *Bonwit*). Similarly, in *Bonwit Teller & Co. v. United States*, 283 U.S. 258 (1931), this Court upheld jurisdiction in an overpayment of tax case, over the Government's protest that no claim for refund had been filed, based on the IRS's certificate of overpayment: "Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought." *Id.* at 265.

The Government itself cited the *Bonwit* ruling in *C. T. C. Inv. Co. v. United States*, 108 F.2d 383, 385 (7th Cir. 1939) in an attempt to defeat district court jurisdiction,[18] at the same time arguing that the claimant had not satisfied section 3226's protest requirement. The Seventh Circuit Court held that a corporation that overpaid its taxes, and then received assurances of payment, could indeed sue under contract in the Court of Claims (or under tort in the district court to recover an overpayment against a deceased Collector) and that the six-year Tucker Act statute of limitations applied. *Bonwit* at 265-66. Similarly, this Court in *Daube v. United States*, 289 U.S. 367 (1933), also recognized that a separate contract right of action, if properly supported, falls under the Tucker Act's six-year limitations period rather than the tax refund statute's shorter period. *Id.* at 370-73. The Court

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[18] The Government in *C.T.C.* tried to defeat district court jurisdiction by contending the case sounded in contract and thus fell outside the district court's $10,000 limit under the Tucker Act for contract claims.

entertained jurisdiction over a contract-based claim and reaffirmed the principle that "[a] specific limitation applicable to claims for the recovery of taxes is set aside and superseded whenever the statement of an account sustains the inference of an agreement that the tax shall be repaid."[19] *Id.* at 372-73.

It is also widely recognized in tax law that an "alternative theory for recovery" exists under the "account stated" doctrine, a common law theory based in implied contract. 15 *Mertens Law of Federal Income Taxation* § 58A:88 at 58A-194. "Where a taxpayer has failed to meet the two-year statute of limitations or other jurisdictional prerequisites required for a tax refund suit, a taxpayer may bring suit on an account stated on the basis that the government agreed to make a refund to the taxpayer." *Id.* at 58A-194 to 58A-195. Other parties seeking to recover unused portions of money deposited with the government to pay taxes are not required to file a claim for a refund, but can recover under the longer statute of limitations provided by 28 U.S.C. 2501 based on a "promise to pay" theory.[20] At least one court has permitted relief directly under the Tucker Act as a complete alternative to the tax

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[19] Plaintiff lost on the merits because "no definitive adjudication in favor of this taxpayer was ever made by the Commissioner or by other authority." *Id.*

[20] *See New York Life Ins. Co. v. United States*, 118 F.3d 1553, 1557-59 (Fed. Cir. 1997) (section 7422(a) does not apply to refund claim that was not a suit under the tax refund statute); *Schenley Imp. Corp. v. United States*, 121 F. Supp. 646 (Ct. Cl. 1953) (same).

refund statute, apparently without an independent right of recovery.[21]

Alternative statutes may also provide the basis for a recovery outside the confines of the tax refund statute. In *Ray v. United States*, 453 F.2d 754 (Ct. Cl. 1972), plaintiff sought to recover taxes improperly withheld from his retirement pay but chose to proceed under a separate benefits statute rather than the tax refund statute. *Id.* at 758. The Court of Claims held that "since plaintiff is not claiming under the Code, he need not preserve his claim according to its provisions," including by pursuing the code-requisite claims process. See also *Dooley*, 182 U.S. at 228; *Hvoslef*, 237 U.S. at 10-11; *Emery*, 237 U.S. at 31-32. The *Hatter* case brings the theory of alternative routes of recovery to the present and adds, along with *South Carolina* (state rights) and arguably *Dooley* (limits on president's war powers), a constitutional claim to the mix. *Hatter v. United States*, 953 F.2d 626, 628 (Fed. Cir. 1992). The judges in *Hatter* "could have pursued a tax refund"[22] to recover the social security taxes they claimed were unconstitutional, but they invoked Tucker Act jurisdiction instead based on the compensation clause of the Constitution. Section 7422(a) thus did not apply.[23]

Hatter (and *Cyprus Amax* before it) thus caps off a long line of cases allowing alternative recovery, under alternative rights to relief, without proceeding through the tax refund statute. This entire line of

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21 *Camp v. United States*, 44 F.2d 126 (4th Cir. 1930).

22 *Id.* at 629.

23 *Id.* at 628.

cases stands witness to the invalidity of the Government's primary contention here, that tax recovery claims are uniformly "subject to the exclusive procedural requirements set out in the tax refund statute, no matter what the source of the alleged illegality ...." Pet. Br. at 8.

III. The *Regional Railroad Reorganization Act* Line of Cases Requires More than an Implied Repeal of an Existing Statute's Provisions.

A. This Court Has Repeatedly Rejected Implied Repeals of Tucker Act Jurisdiction.

In light of the Tucker Act's historical tax jurisdiction outside of the tax refund statutes, the only remaining question is whether the provisions of the tax refund statute at some point in time repealed one hundred years of separate tax jurisdiction contained in the Tucker Act, including the right to recover directly under the Export Clause. The Government would presumably concede (assuming a self-executing Export Clause) that the Tucker Act is broad enough to allow Respondents' suit to go forward if the tax refund statute did not exist. Given that breadth of jurisdictional grant in the Tucker Act, the only rational way to characterize what the Government is contending is that section 7422(a) and the rest of the refund statute repealed a portion of Tucker Act jurisdiction and replaced it with the refund statute procedures.

Amicus believes this position is wrong, and in fact gets the equation exactly backwards. Under *Regional Rail*, the established principle that governs

this case is that implied repeals of existing statutes, or any part of them, are disfavored, and heavily so.[24] This rule is so dominant that five consecutive Supreme Court decisions have *rejected* any attempt to cut back on Tucker Act jurisdiction through an implied repeal by other statutes.

The most significant of this line of cases, because it is routinely cited in subsequent decisions, is the *Regional Rail* cases. In 1973, to address a national crisis caused by the filing of bankruptcy petitions by the nation's major railroads, Congress passed the Regional Rail Reorganization Act and established a Special Court to determine the distribution of railroad properties. Penn Central challenged the law as an unconstitutional taking, and the Government asserted that the Tucker Act provided an adequate compensation remedy, thereby foreclosing the takings claim. 419 U.S. at 109-21. The critical issue on appeal was whether the Rail Act preserved, or in the alternative eliminated, Tucker Act jurisdiction. *Id.* at 126. Based on the canon that implied appeals are heavily disfavored, the Court first corrected the District Court's misstatement of the question:

> The District Court made the wrong inquiry. The question is not whether the Rail Act expresses an affirmative showing of congressional intent to

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[24] Norman J. Singer, Sutherland Statutory Construction, Statutes and Statutory Construction Sixth Edition, Volume 2, pp. 461-66 (West Group 2001) ("The legislature is presumed to intend to achieve a consistent body of law. In accord with this principle subsequent legislation is not presumed to repeal existing law in the absence of expressed intent.").

> permit recourse to a Tucker Act remedy. Rather, it is *whether Congress has in the Rail Act withdrawn the Tucker Act grant of jurisdiction to the Court of Claims* to hear a suit involving the Rail Act founded ... upon the Constitution". ..."the true issue is *whether there is sufficient proof that Congress intended to prevent such recourse.*"

Id. at 126 (citation omitted) (emphasis added). To determine whether "the Rail Act withdrew the Tucker Act remedy that 'would otherwise exist'" (*quoting* the Special Court opinion), the Court looked, but could not find, any such conclusive evidence in the Act itself, in the legislative history, or in the Act's structure. Most critically, the act and history were completely silent (like the tax refund statute here) regarding the Tucker Act's concurrent jurisdiction. The Court concluded that "these provisions at least equally support the inference that Congress ... never focused upon the possible need for a suit in the Court of Claims." *Id.* at 128. "The most that can be said is that the Rail Act is ambiguous on the question. In that circumstance, applicable canons of statutory construction require us to conclude that the Rail Act is not to be read to withdraw the remedy under the Tucker Act." *Id.* at 133.

Equally critical was the importance of the original, broad Tucker Act jurisdiction: "'A new statute will not be read as wholly *or even partially* amending a prior one unless there exists a "positive repugnancy" between the provisions of the new and

those of the old that cannot be reconciled.'" *Id.* at 134 (*quoting* the Special Court opinion) (emphasis added). The danger of allowing a statute such as the Rail Act (or tax act here) to eviscerate the broad provisions of the Tucker Act by implication only is that it undermines Congress's presumed intent in enacting the original Court of Claims jurisdictional extent:

> Presumably Congress had given serious thought to the earlier statute [the Tucker Act], here the broadly based jurisdiction of the Court of Claims. Before holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end... (*quoting* Special Court report).

Id. at 134. Thus, the Rail Act neither barred nor restricted Tucker Act jurisdiction.

Following *Regional Rail*, this Court has declined in three other cases to reduce Tucker Act jurisdiction in the face of complex statutes with plenary language like section 7422(a).[25] In *Duke*

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[25] The fifth Supreme Court case rejecting any implied repeal of Tucker Act jurisdiction preceded the *Regional Rail Cases*. *Amell v. United States*, 384 U.S. 158 (1966) (suits in Admiralty Act did not repeal Tucker Act jurisdiction over federal seamen compensation cases). *See also Morton v. C.R. Mancari*, 417 U.S. 535 (1974) (1972 Equal Opportunity Employment Act's proscription against race-based hiring did not impliedly repeal the 1934 Indian Reorganization Act's preference for Native American hiring).

Power, environmental groups alleged that the Price-Anderson Act's limitation of nuclear plant liability to $560 million constituted a taking. This Court disagreed on the ground that "on our reading the Price-Anderson Act does not withdraw the existing Tucker Act remedy." *Id.* at 94, n. 39 (*citing Regional Rail*). Six years later the Court issued one of the most important cases in this series, also one involving the Tucker Act, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). Monsanto claimed that the complex data disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) constituted a taking of its trade secrets, and that its right to compensation in the Court of Federal Claims was foreclosed because Congress in FIFRA had withdrawn Tucker Act jurisdiction over such a claim. The Court found, however, that FIFRA is silent on the interaction with the Tucker Act: "Nowhere in FIFRA or in its legislative history is there discussion of the interaction between FIFRA and the Tucker Act." *Id.* at 1017. Absent clear Congressional intent to repeal that portion of the Tucker Act, the Court rejected an implied repeal of the Tucker Act's broad jurisdictional grant:

> Since the Tucker Act grants what is now the Claims Court "jurisdiction to render judgment upon any claim against the United States founded ... upon the Constitution," we would have to infer a withdrawal of jurisdiction with respect to takings under FIFRA from the structure of the statute or from its legislative history. A withdrawal of jurisdiction would amount to a partial repeal of the Tucker

> Act. This Court has recognized, however, that repeals by implication are disfavored.

Id. at 1017-18 (*citing Regional Rail* and other cases).

Finally, in 1990 this Court in *Preseault* rejected a statutorily-implied repeal of the Tucker Act even though plaintiff argued, as the Government does here, that the repeal was necessary to protect the public fisc. Plaintiff landowners complained that the National Trails System Act ("Rails-to-Trails"), which permitted railroads to transfer unused rights-of-way to state or private groups to develop recreational trails, took away their reversionary easement interest and was thus an unconstitutional taking and an improper exercise of the Commerce Clause. This Court rejected the implied repeal for the same reasons as in earlier cases – the Rail Act with its legislative history "does not manifest the type of clear and unmistakable congressional intent necessary to withdraw Tucker Act coverage," *id.* at 14, and the public fisc (the stated intent to operate the rails-to-trails scheme at "low cost") did not support an implied repeal, *id.* at 16.

Several Circuit Court decisions are also on point, including *California v. United States*, 271 F.3d 1377 (Fed. Cir. 2001), in which the Federal Circuit held that the state of California could pursue a direct court claim, based on a contract right of action, against the government for flood damage claim reimbursement. The Government did not prevail in arguing that it was protected from contract liability by very broad language in the 1928 Flood Control Act immunizing the Government from

all flood liability ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place ...." (citing 33 U.S.C. 702(c) (1964)). *Id.* at 1381. The court refused to imply a withdrawal of the Tucker Act's contract jurisdiction despite the all-encompassing language in the Flood Control Act.[26] Accordingly, a repeal of Tucker Act jurisdiction cannot be implied by another statute's plenary language and "finely-reticulated scheme" when Congress has not directly addressed the concurrent Tucker Act role and withdrawn that jurisdiction.

B. The Tax Refund Provisions Do Not Repeal Any Portion of Tucker Act Jurisdiction Over Matters Arising Under a Different Substantive Right.

The analysis in the above line of cases demonstrates why there has been no repeal of the Tucker Act's residual tax jurisdiction, including separate Export Clause actions, by section 7422(a).

(1) *The complete absence of any express intent to repeal the Tucker Act forecloses any implied repeal by the tax statute.* Nothing in the tax refund statute on which the Government relies contains any

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[26] *See also Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 324-25 (8th Cir. 1989) ("Rails-to-Trails" act did not divest court of Tucker Act jurisdiction); *Gun South, Inc. v. Brady*, 877 F.2d 858, 868-69 (11th Cir. 1989) (Gun Control Act did not impliedly repeal gun manufacturer's Tucker Act right to compensation); *Zoltek Corp. v. United States*, 58 Fed. Cl. 688, 702-04 (Ct. Fed. Cl. 2003) (passage of act granting narrow patent jurisdiction to Tucker Act did not thereby impliedly repeal the remaining Tucker Act jurisdiction over patents).

reference whatsoever to the residual Tucker Act tax jurisprudence, much less any direct statement that Congress intended to eliminate one hundred years of independent claims court tax jurisdiction. Nor does the legislative history, at least that of the 1954 Internal Revenue Act which included section 7422(a), do so. In the one section of the House Report that addresses why the statute of limitations changed, the legislative history focuses on other, code-based four-year limitations periods and never mentions the Tucker Act six-year limitations period.[27] It appears Congress never thought about this aspect, possibly because the residual tax jurisdiction governs a relatively small number of tax recovery claims. The best that can be said is that this history is *ambiguous* and therefore cannot support an implied repeal of an existing statute. Congress has had multiple opportunities to state expressly that it so intended when the tax refund statutes were overhauled in 1913, 1939, 1954, and 1986 and when section 7422(a)(1)'s predecessors were amended or codified many times since 1875. All of these enactments occurred without any explicit abrogation of an ongoing set of Tucker Act tax cases that continued throughout this period (Section II above).

(2) *The plenary language in section 7422(a) is insufficient to support an implied repeal.* The

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[27] *See* Internal Revenue Code of 1954, Report of the Committee on Ways and Means, House of Representatives, H.R. 8300, House Report No. 1337, 83rd Congress, 2d Session (March 9, 1954) ("The 3-year period of limitations for assessment or refund now applying in the case of the income, estate and gift taxes is applied to excise taxes, which presently have a 4-year limitations period.").

Government rests its argument heavily on the broad language in section 7422(a): "No suit or proceeding shall be maintained in any court for the recovery of any internal tax ...." Section 7422(a) applies by its terms, however, only to actions under the refund statute for "recovery of taxes" and is not materially different in its breadth than language found in several of the acts held above not to imply a repeal of Tucker Act jurisdiction. FIFRA required that a data submitter who does not comply with statutory provisions "shall forfeit the right to compensation for use of the data ...." *Monsanto*, 467 U.S. at 1018. The Regional Rail Act required "consolidation before it of 'all judicial proceedings with respect to the final system plan." 419 U.S. at 127. The rails-to-trails act in *Preseault* provided that no payments could be made except through Congressional appropriations "notwithstanding any other provision of this Act," which plaintiffs claimed eliminated Claims Court litigation. 494 U.S. at 12. The broad "no liability of any kind for any flood" language of the Flood Control Act at issue in *California* is virtually on point with section 7422(a). *California*, 271 F.3d at 1381. Plenary language such as that in section 7422(a) is common in statutes but cannot by itself work a repeal of an earlier statute.

(3) *The "finely reticulated scheme" and public purpose of the tax act are not sufficient to imply a repeal.* Several of the statutes above, in particular the rail reorganization act in *Regional Rail*, the FIFRA data compensation scheme in *Monsanto*, and the rails-to-trails legislation in *Preseault*, involved complex schemes designed for important public purposes. As complex and important as the nation's tax refund scheme is, it is

difficult to distinguish this scheme from the acts at issue in the "no-repeal" line of cases. In none of the above cases did the Court imply that the outcome would have been different if the statute had been *more* complex, or *more* important for public purposes.

(4) *There is no "positive repugnancy" between the Tucker Act approach and the tax refund approach sufficient to imply repeal.* Although the two statutes appear to conflict, that was the case with every statute discussed in the above cases. The Court found no "positive repugnancy" between the acts because it could construe each statute to apply to separate circumstances.[28] That approach is equally preferable here, where the tax refund statute's procedures can be construed to apply to all matters arising under the tax refund statute, and the Tucker Act procedures are applicable to actions brought pursuant to other sources of a right of tax recovery.

C. The Cases Cited by the Government Do Not Compel the Conclusion that Tucker Act Jurisdiction Must Be Repealed in Favor of the Tax Statute.

The four cases primarily relied on by the Government – *New York & Cuba Mail S.S. Co*, *Hinck*, *Kreider*, and *E.C. Term of Years Trust* – do not support the Government's position in this case.

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[28] *See, e.g., Regional Rail*, 419 U.S. at 134; *Morton*, 417 U.S. at 550 (no implied repeal unless statutes are "irreconcilable"); *Monsanto*, 467 U.S. at 1018 (if statutes are "capable of coexistence" no repeal is implied).

Only *New York & Cuba* even deals with a circumstance in which a taxpayer asserted a right to recover independent of the tax refund statute, and that case turns on a common law doctrine lost to the dust of tax arcana since 1925. The cases instead stand for the same proposition asserted in this brief, that the procedural rules governing recovery arise from the source of the right of recovery.

For example, in *Kreider* the taxpayer availed himself of the tax statute's claims process to pursue a refund of income taxes, but then attempted to use the Tucker Act statute of limitations to extend his filing period. 313 U.S. at 446. The Court's rejection of that attempt was correct - *Kreider's* only source of a right to recover these taxes was the tax refund statute itself, and he was thus constrained to fit within its statute of limitations. He could no more "borrow" the Tucker Act limitations period than the Government can "borrow" the tax refund statute limitations period in this case and impose it on an Export Clause right of action.

This Court's *Hinck* decision is very similar. In *Hinck* the taxpayer sought to bypass a Tax Court appeal and go into federal court instead to claim an abatement of interest under tax refund statute section 6404(e)(1). The Court held that the taxpayer's only recourse was the Tax Court. *Id.* at 2015-17. For two reasons, *Hinck* fits well within the analysis described in this brief and does *not* fit the Government's theory of the case. First, Hinck's right to recover – the right to abate interest in section 6404 – was created by Congress in 1986, and Congress attached the procedural requirements to exercise that right (review in the Tax Court) to the

right itself. The Respondents' right of recovery, in contrast, arises not out of the tax refund statute but out of the Export Clause, which through the Tucker Act has its own set of rules. Second, before the enactment of section 6404(e)(1), the right to abate interest *did not exist* in statutes, the Constitution, or anywhere else. Against a blank page, Congress created a right and its concomitant remedies. *Hinck* could only apply here if the Export Clause were written out of the Constitution and Congress had never passed the Tucker Act. To the contrary, the Court's refusal in *Hinck* to find an implied repeal *is* fully applicable here, where there is likewise "no indication of any 'language on the statute books that [Congress] wishe[d] to change'" the Tucker Act in any way, including its statute of limitations. *Hinck*, 127 S. Ct. at 2016 (citing *United States v. Fausto*, 484 U.S. 439, 453 (1988)).

The primary holding of *New York & Cuba* was that the taxpayer was foreclosed from recovering an unconstitutional export tax because he paid the tax without being under duress. The "duress" doctrine is an archaic, common law tax rule that disappeared around 1925, but while it was in effect it infected every form of claim for taxes, including constitutional claims. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 375-76 (1933); *see, e.g.*, *New York & Cuba*, 200 U.S. at 491-92. Thus, the "right to recover" asserted in *New York & Cuba* – the Export Clause and Tucker Act – were already restrained by the duress doctrine, and *not* through the revenue statute. The Court did not hold that revenue act procedures governed a constitutional claim. Further, five years before *New York & Cuba*, this Court had already held that the claims court had

jurisdiction over a tax-related action not based on the revenue code. *Dooley*, 182 U.S. at 222.

Finally, *E.C. Term of Years* provides nothing more than another example of a substantive right being governed by the procedures attached to that right. The taxpayer trust had its assets levied by the IRS and sought to challenge that levy. The substantive right to do so, and concomitant wavier of sovereign immunity, was contained in a specific tax refund statute provision, section 7426(a)(1), which "specifically authorized" an action to challenge a levy. *Id.* at 1765. Having missed the statute of limitations under 7426(a)(1), the trust tried, in vain, to resort to a longer statute of limitations under the general grant of jurisdiction to district courts over tax claims, 28 U.S.C. 1346(a)(1). As with the other cases the Government cites, the trust's *right to recover* – the right to challenge a levy – was contained in the code itself, not in any other statute or constitutional provision. Congress expressly imposed limits on that right of recovery, including a nine-month statute of limitations, but those limits do not apply to Respondents' Export Clause cause of action. In addition, the trust's reliance on section 1346 was doomed to fail because that provision creates jurisdiction, not a substantive right to recover. The Respondents here are not relying on the parallel provision, section 1491, for their *right* to recover, which comes from the Export Clause, but merely for court jurisdiction to hear that claim. The distinction is critical – if no source of a right to recover exists other than the refund statute, then refund statute provisions also govern the procedures available.

Nothing in these four cases can in any way justify the Government's contention that all Export Clause tax jurisprudence has been swallowed whole by the tax refund statute. Even less can they match up with the cohesive and highly consistent series of "no implied repeal" cases that compel the conclusion that the Export Clause right of recovery has *not* been repealed and is alive and well.

CONCLUSION

The Federal Circuit Court reached the correct decision. The procedures under the tax refund statute, including its more limited statute of limitations, are not applicable to a direct cause of action under the Export Clause. They arise from a separate route to recovery, and Congress has expressed no intention to replace Tucker Act jurisdiction over claims based on other substantive rights with the provisions in the tax refund statute. Respondents should prevail in this appeal.

Respectfully Submitted

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